91-1614

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

INDUSTRIAL RISK INSURERS,
Petitioner,

v.

COTTON BROTHERS BAKING COMPANY, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a Court of Appeals recall its mandate in the absence of some intervening development that would justify reopening a final judgment?

2. Did *sua sponte* modification of a final judgment, without opportunity to be heard and without explanation, take $4 million of property without due process of law?

3. Did the Court of Appeals so depart from the usual course of judicial proceedings as to merit the exercise of supervisory powers by this Court?

LIST OF PARTIES

Industrial Risk Insurers is a property insurance pool which provides underwriting, loss prevention and claims handling services to member companies. The member companies of IRI who are responsible on the policy in question are: Aetna Casualty and Surety Company, Hartford, CT; Aetna Insurance Company, Hartford, CT; American Casualty Company of Reading, Pennsylvania, Reading, PA; Commercial Union Insurance Company, Boston, MA; Connecticut Indemnity Co., Hartford, CT; Continental Casualty Company, Chicago, IL; Continental Insurance Company, Concord, NH; Federal Insurance Company, Short Hills, NJ; Fidelity and Casualty Company of New York, Concord, NH; Fireman's Fund Insurance Company, San Francisco, CA; Firemen's Insurance Company of Newark, New Jersey, Newark, NJ; General Accident Fire and Life Assurance Corporation, Ltd., Philadelphia, PA; Glen Falls Insurance Company, Wilmington, DE; Great American Insurance Company, Cincinnati, OH; Hanover Insurance Company, Manchester, NH; Hartford Fire Insurance Company, Hartford, CT; Home Insurance Company, Manchester, NH; Insurance Company of North America, Philadelphia, PA; Monarch Insurance Company of Ohio, Columbus, OH; National Fire Insurance Company of Hartford, Hartford, CT; National Surety Corporation, Chicago, IL; National Union Fire Insurance Company of Pittsburgh, Pa., Pittsburgh, PA; New Hampshire Insurance Company, Manchester, NH; Northbrook Property and Casualty Insurance Company, Northbrook, IL; Northern Insurance Co. of New York, New York, NY; Northwestern National Insurance Company of Milwaukee, Milwaukee, WI; Pacific Indemnity Company, Los Angeles, CA; Providence Washington Insurance Company, Providence, RI; Reliance Insurance Company, Philadelphia, PA; Royal Globe Insurance Company, Chicago, IL; St. Paul Fire and Marine Insurance Company, St. Paul, MN; State Farm Fire and Casualty

Co., Bloomington, IL; Sun Insurance Office Limited, New York, NY; Travelers Indemnity Company, Hartford, CT; United States Fidelity and Guaranty Company, Baltimore, MD; United States Fire Insurance Company, New York, NY; and Zurich Insurance Company, Chicago, IL.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
FEDERAL RULES INVCLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
I. THE DECISION CONFLICTS WITH DECISIONS IN OTHER CIRCUITS	4
II. THE DECISION RADICALLY DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS	8
CONCLUSION	11

TABLE OF AUTHORITIES

Cases: Page

Aetna Life Insurance Co. v. LaVoie, 475 U.S. 812 (1986) 11
Chambers v. NASCO, Inc., 111 S.Ct. 2123 (1991) .. 6, 7
Frazier v. Heebe, 482 U.S. 641 (1987) 11
Gondeck v. Pan American World Airways, Inc., 382 U.S. 25 (1965) 5
Greater Boston Television Corp. v. FCC, 463 F.2d 268 (DC Cir. 1971) 6
Legate v. Maloney, 348 F.2d 164 (1st Cir. 1965) 5
Levine v. United States, 362 U.S. 610 (1960) 10
Motor Vehicles Manufacturer's Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983) .. 11
Powers v. Bethlehem Steel Corp., 483 F.2d 963 (1st Cir. 1973) 5, 6
Rufo v. Inmates of Suffolk County Jail, 112 S.Ct. 748 (1992) 7
United States v. Allegheny-Ludlum Industries, Inc., 568 F.2d 1073 (5th Cir. 1978) 9
United States v. Ohio Power Co., 353 U.S. 98 (1957) 5
United States v. Tulare Lake Canal Co., 677 F.2d 713 (9th Cir. 1982) 5, 6
Wisconsin v. Constantineau, 400 U.S. 433 (1971) .. 11

Federal Rules:

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1332 2
Fed. R. Civ. App. P. 40(a) 2, 4, 8, 9
Fed. R. Civ. P. Rule 40 7
Fed. R. Civ. P. 60 ..... 2, 6, 7
Fed. Civ. Jud. P. & Rules 424 8
Fifth Circuit Local Rule 41.2 ..... 2, 9

Miscellaneous:

11 C. Wright, A. Miller & E. Gressman, Federal Practice and Procedure § 2864 (1977) 6
16 C. Wright, A. Miller & E. Gressman, Federal Pratice and Procedure Wright & Miller § 3938 (1977) 5, 6, 8
16 C. Wright, A. Miller & E. Gressman, Federal Practice and Procedure § 3986 (1977) 8, 9

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Industrial Risk Insurers (IRI), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on January 6, 1992.

OPINIONS BELOW

The opinions of the Fifth Circuit are reported at 941 F.2d 380 (5th Cir. 1991) and 951 F.2d 54 (5th Cir. 1992) and are reprinted in the appendix, 1a-24a, 73a-78a. The order recalling the mandate is reprinted at 83a-84a. The decision of the United States District Court for the Western District of Louisiana is unreported and reproduced at 25a-72a.

JURISDICTION

Jurisdiction of the lower courts was founded on 28 U.S.C. § 1332. The judgment to be reviewed from was entered January 6, 1992 and this Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

Fed. R. Civ. App. P. 40(a) reads in relevant part: "No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request."

Fed. R. Civ. P. 60 reads in pertinent part:

> (a) Clerical mistakes in judgments . . . may be corrected by the court at any time. (b) On motion and on such terms as are just the court may relieve a party . . . from a final judgment . . . [when] (5) a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fifth Circuit Local Rule 41.2: "A mandate once issued shall not be recalled except to prevent injustice."

STATEMENT OF THE CASE

The relevant facts all occur after denial of petitions for rehearing by the Fifth Circuit. Thus, the issues are procedural only and literally without precedent.

The district court ruled that pre-trial payments to the insured need not be credited to the insurer. The Fifth Circuit then reversed, holding that failure to credit the payments would result in a $4 million double recovery by the insured. 941 F.2d at 385, 8a. Both parties filed petitions for rehearing, the insured's substantive, the insurer's pointing out technical mathematical errors. The

petitions were denied on October 10, 1991, although technical changes were made in the original opinion.[1] 81a-82a.

The parties then agreed upon the amount necessary to satisfy the judgment, and on November 1, 1991, IRI deposited that amount into the Registry of Court. The mandate issued on November 4. The case was over. The judgment was final. No case or controversy was pending in any court and no further pleading or motion was filed by any party.

But, on November 25, 1991, the Court *sua sponte* recalled its mandate "pending further consideration of this case by the court." 951 F.2d at 55, 74a. When counsel for the parties called the Clerk of the Court to ask for information, they were told to file no papers unless requested to do so. No request came. The only externally observable event was that from Monday, November 4, through Thursday, November 7, the trial judge, whose opinion had been reversed in part, sat by designation with the Fifth Circuit.

On January 6, 1992, the Fifth Circuit granted respondent's previously denied petition for rehearing. In a "Substituted Opinion on Rehearing," the Court reversed its previous unanimous conclusion that the payments made prior to trial had to be credited to IRI to prevent a double recovery.[2] IRI was neither asked nor allowed to respond to respondent's petition for rehearing. Instead of delaying the mandate, the January 6 opinion also ordered that

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[1] The case, both at trial and on appeal, involved a third party, Baker Perkins, Inc. (Baker Perkins), an industrial baking supplier, who contracted to install replacement equipment after the fire that caused the interruption to respondent's business. There were delays which the parties attributed to each other. At trial, respondent obtained a judgment against Baker Perkins which was affirmed in part and reversed in part on appeal. Petitions for rehearing were denied, along with the others on October 10, 1991.

[2] The judgment against Baker Perkins was unaffected as was a judgment for $324,735 against IRI on a separate fire loss policy.

"the mandate shall issue forthwith." 951 F.2d at 55, 74a. IRI unsuccessfully moved for stays of execution and recall of mandate.

REASONS FOR GRANTING THE WRIT

Petitioner's research discloses no prior case wherein a federal court has recalled a mandate and then granted a petition for rehearing that it had previously denied. *A fortiori*, there are no cases where that occurred without an opportunity to respond to the petition for rehearing as contemplated by Fed. R. Civ. App. P. 40(a).[3] Quite naturally, therefore, this has never been done before by a court that did not offer a single syllable in explanation. The Fifth Circuit rendered a single judgment that, by the Court's own terms, was correct September 13, correct October 10, final November 4, questionable November 25, and wrong January 6. Yet, the Court either could not or would not explain why.

There is always a first time and this was it which then becomes precedent for the second unless it is checked. The need to halt such behavior represents the compelling reason for exercise of this Court's supervisory powers to intervene. Something fundamentally wrong transpired and it casts a foreboding shadow on the appearance of fair and impartial justice in the federal courts.

I. THE DECISION CONFLICTS WITH DECISIONS IN OTHER CIRCUITS.

No prior case in *any* circuit has recalled a mandate and then granted a previously denied petition for rehearing. The case is both unprecedented and not within the contemplation of the law in any circuit. The Fifth Circuit stretched its inherent powers to the limits and then broke them.

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[3] "No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request."

Although it is impossible to know, because the Fifth Circuit offered no explanation, presumably the spontaneous recall of mandate was based on the Court's belief that it may have erred and that the error may have created an injustice. That is not the law in any other circuit. There is *no* dissent from the proposition that a final judgment once issued remains final except in extraordinarily limited circumstances—and those circumstances specifically exclude change of mind by the judges. *See, e.g., Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir. 1965) ("If [the court] were in error . . . it would be far greater error to permit reconsideration now after denial of petitions for rehearing and certiorari); *Powers v. Bethlehem Steel Corp.*, 483 F.2d 963, 964 (1st Cir. 1973) ("Alleged erroneous rulings of law are generally not held to be sufficiently unconscionable to justify reopening a judgment not void when issued"); *United States v. Tulare Lake Canal Co.*, 677 F.2d 713, 715 (9th Cir. 1982), *vacated on other grounds*, 459 U.S. 1095 (1983) (citing Wright & Miller § 3938 at 284-85) ("a conviction that the court erred [is] ordinarily not alone sufficient grounds for recall of mandate after final judgment"). To repeat, petitioner's research discloses no prior case wherein a federal court has recalled a mandate and then granted a petition for rehearing that previously had been denied.

This is not to imply courts do not recall mandates for, of course, they do. Correcting clerical errors constitutes the prime reason for recall of mandate. Wright & Miller § 3938 at 283-84. There is also a burgeoning class of cases where the mandate is recalled[4] to provide equal justice for those similarly situated. This Court took the lead in *United States v. Ohio Power Co.*, 353 U.S. 98 (1957) and *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965) and the circuits have followed—

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[4] Or its functional equivalent occurs.

all the while stating that this inherent power should be used sparingly.[5] *Bethlehem Steel*; *Tulare*.

These exercises of inherent power by the Courts of Appeals conform to the powers of the district courts to modify judgments under Fed. R. Civ. P. 60. Thus, they "fill in the interstices" of the rules, *Chambers v. NASCO, Inc.*, 111 S.Ct. 2123, 2134 (1991), whereby a Court of Appeals has similar powers to recall a mandate as a district court has to modify a judgment.[6]

The Fifth Circuit, however, went far beyond what a district court could do under Fed. R. Civ. P. 60. Indeed, it is no exaggeration to state that had a Fed. R. Civ. P. 60 motion been filed with the district court after November 4, it would have been dismissed as frivolous. The instant case involves no clerical errors; nor is there a second or intervening case that argues for similar results. The September 13 opinion of the Fifth Circuit ruled on the merits that IRI's payments to respondent prior to trial should be credited to IRI in deter-

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[5] This has caused a protest about overuse by Wright & Miller who believe that the strong federal interest in the policies of repose is too often overcome by a desire to see similar results in similar cases even after one has become final. Wright & Miller § 3938 at 287.

[6] In *Greater Boston Television Corp. v. FCC*, 463 F.2d 268 (DC Cir. 1971), Judge Leventhal provides an "exhaustive and scholarly" analysis of recall of mandate decisions. Wright & Miller § 3938 at 288. The parallels between Judge Leventhal's examples and Fed. R. Civ. P. 60 are clear: (a) need to correct clerical errors—Fed. R. Civ. P. 60(a); (b) fraud on the court—Fed. R. Civ. P. 60(b)(3); (c) avoiding different results in different cases at the same time—Fed. R. Civ. P. 60(b)(5); (d) the need to revise unintended instructions to the trial court which would produce an unjust result—Fed. R. Civ. P. 60(b)(6), as well as a variant of Fed. R. Civ. P. 60(a); (e) a catchall "other" category based on reasons that would support an independent suit at the trial court—Fed. R. Civ. P. 60(b)(2)(4). The now growing category of cases where a mandate is recalled to make it conform to a subsequent decision of this Court finds its parallel in Fed. R. Civ. P. 60(b)(6). *See* Wright & Miller § 2864 at 223.

mining the amount of loss. Respondent then devoted nine and one-half pages of its petition for rehearing to arguing that the recovery of pre-trial payments would not constitute a prohibited double recovery.[7] This position was rejected in the denial of rehearing on October 10 and issuance of mandate on November 4. It is then adopted in the "revised and corrected" opinion of January 6, two months after the case or controversy had ended at the Fifth Circuit. The Court changed its mind!

To second-guess is human. To undo a presumed error during the appropriate period is laudable. But, at some point, there must be an end to litigation (and jurisdiction) in a court, and if it is not at issuance of mandate, just where and when is it? When a mandate issues, everything changes and an appellate court may only act again under extraordinary circumstances paralleling those listed in Fed. R. Civ. P. 60. To go farther is to go against the law of all circuits and to claim an inherent power broader than the federal rules contemplate.[8] Because inherent powers are necessary to protect "the integrity of the court," *NASCO*, 111 S.Ct. at 2132, they must be used consistently with the integrity of process. The Fifth Circuit failed this in two ways: (1) by ignoring Congress' mandates in the federal rules and (2) by its failure to explain its actions. The result was a $4 million taking of petitioner's property without due process of law.

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[7] To the extent that the petition for rehearing simply reargued the original case, it did not conform to the Fifth Circuit's Internal Operating Procedure under Fed. R. Civ. App. P. Rule 40 which provides that a petition for rehearing "is not to be used for reargument of the issues previously presented . . . ." To the extent it did present a new argument, failure to allow a response is a blatant denial of the fundamental right to be heard. *See* Part B *infra*.

[8] For private civil litigation. Finality is less of an issue in institutional litigation. *Rufo v. Inmates of Suffolk County Jail*, 112 S.Ct. 748, 759 (1992).

Had the Court seen fit to explain its actions, the conflict with the other circuits would be out in the open. Presumably, the Court would have stated it concluded it had erred and the error resulted in a presumed injustice, thereby constituting the extraordinary circumstances necessary for recall of mandate. Yet, no other circuit finds extraordinary circumstances flowing from the fact of its own supposed error. To repeat ourselves, no court has ever recalled its mandate to grant a previously denied petition for rehearing and respondent will be able to offer none in its opposition. As Wright & Miller state, "it should be apparent that the power to recall a mandate should not be used to destroy finality and repose simply on the ground that the court of appeals wrongly decided the case." § 3938 at 284-85. The Fifth Circuit ought not be able to elude its rejection of the law everywhere else by the expedient of not explaining its actions. To allow its unexplained judgment to stand would validate the departure from the accepted norms of judicial behavior.

II. THE DECISION RADICALLY DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The twin pillars of due process of law are procedural regularity and the right to be heard. Fed. R. Civ. App. P. 40(a) embodies the latter. Its injunction that "[n]o answer to a petition for rehearing will be received unless requested by the court . . ." recognizes that most petitions for rehearing will be routinely denied. 16 C. Wright, A. Miller & E. Gressman, Federal Practice and Procedure § 3986 at 473 (1977) (hereinafter Wright & Miller). Thus, the Advisory Committee on Appellate Rules explained, this provision was "included to save time and expense to the party victorious on appeal." Fed. Civ. Jud. P. & Rules 424 (West 1991 rev. ed.).

The changed circumstances flowing from deciding a case and writing an opinion transform the court from

neutral arbiter into the prevailing party's first line of defense. When something in a petition for rehearing shakes that defense, then Fed. R. Civ. App. P. 40(a) notes "a petition for rehearing will ordinarily not be granted in the absence of" a request for a response. The prevailing party's basic rights are at issue and counsel for that party, who will have a better comprehension of the entire record, may be able to cast serious doubt on the propriety of granting the petition. Thus, Wright & Miller state that "[i]f the court finds any merit in the petition, the court *will direct* its clerk to request that the prevailing party file an answer." § 3986 at 473 (emphasis added).

The plain meaning of "ordinarily" in the rule is that it will be the extraordinary case when a petition is granted without a response. Such cases do occur, for instance, a directly controlling intervening decision of this Court. *United States v. Allegheny-Ludlum Industries, Inc.*, 568 F.2d 1073, 1074 (5th Cir. 1978). But there was no intervening decision here; indeed, there are no visible extraordinary circumstances except the Court's own flip-flop which occurs without explanation.

The lack of explanation is telling: (1) The Fifth Circuit did not explain why it did not call for a response; (2) The Fifth Circuit did not explain why it recalled the mandate *sua sponte* (it did not even cite its own rule);[9] (3) The Fifth Circuit did not explain how it spontaneously came to believe that an error had been made; (4) and, finally, the Fifth Circuit did not explain why it changed its mind on the merits.

Every lawsuit has its loser and counsel must explain why the loss occurred. Invariably, the underlying message is that the loss occurred consistent with notions of due process: "We had our day in court; we were heard;

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[9] Fifth Circuit Local Rule 41.2: "A mandate once issued shall not be recalled except to prevent injustice."

we gave it our best shot, but could not persuade the court." Counsel for petitioner cannot say that. When the Fifth Circuit chased down its own final judgment, petitioner was not heard and, therefore, had no day in court.

What explanation can be given? The Fifth Circuit gave none. Its silence is broken only by external circumstances: the district judge sitting by designation between the issuance and subsequent recall of the mandate and the continuing serious claims within the same circuit over *ex parte* contacts and outside influences in the court ordered redistricting plan for the Texas Senate.[10] These are not such as to give confidence especially to someone who has watched a case go from final and won, to under consideration, to final and lost, by a procedure that is wholly unprecedented. One can imagine that there might be *some* legitimate explanation but one cannot imagine *what* such an explanation might be. One can only imagine explanations such as improper contacts and information to which IRI was not allowed to respond.[11]

The departures from procedural regularity are significant, blatant and unexplained. They fly in the face of "the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.'" *Levine v.*

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[10] New York Times, February 17, 1992 at A11; February 14, 1992 at A19; January 26, 1992 at A14; Texas Lawyer, February 17, 1992 at 1, 30.

[11] Petitioner is not accusing the district judge or any other judge of any impropriety. Petitioner does not know if the district judge ever talked with any member of the Fifth Circuit panel, and even if he did, there is no way, at this time, to determine if such a discussion was proper or improper. The problem, in the circumstances of the instant case, is that the Court never offered an explanation for its remarkable conduct nor is any explanation readily apparent. It is essential to public confidence in the fairness and impartiality of the judicial system that the appearance of injustice never intrude into decision making. The safest way to avoid an impression of unfairness is to adhere to procedural regularity.

United States, 362 U.S. 610, 616 (1960) (quoting *Offut v. United States*, 348 U.S. 11, 14 (1954); *see also Aetna Life Insurance Co. v. LaVoie*, 475 U.S. 812, 825 (1986) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). The unexplained departures send the message that the rule of law is binding on all but federal judges. Had the Fifth Circuit been an administrative agency, its actions reversing itself without explanation would be labeled arbitrary and capricious and reversed. *Motor Vehicle Manufacturer's Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 56 (1983) ("while the agency is entitled to change its view . . . it is obligated to explain its reasons for doing so").

Procedural regularity, the need to follow the rules in all cases, is not a mere nicety. It represents due process and, thus, ultimately maintains the integrity of law. "[I]t is procedure that marks much of the difference between rule by law and rule by fiat." *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971). No litigant, no matter how great or how small, should be exposed to the whims of federal judges who ignore the rules either because the rules are inconvenient or because, in the rush to judgment, the judges lack the time to read appellate rules and hear argument on both sides.

CONCLUSION

The instant case stands nakedly alone. Each of the Fifth Circuit's departures from the norm—its *sua sponte* recall of the first mandate, its failure to allow petitioner to respond to the revived petition for rehearing, its failure to cite or discuss the federal rules, its rush issuance of the second mandate—reflects badly on the fair administration of justice within the circuit. Redress for these procedural improprieties rests in this Court's "supervisory powers over federal courts . . . to protect the integrity of the federal system." *Frazier v. Heebe*, 482 U.S. 641, 648 n. 7 (1987).

It may be that from this Petition and the Response that no further briefing of the case would add to the clarity of a dispositive legal issue. Thus, the case may be an appropriate vehicle for summary reversal. But, in any event, petitioner respectfully submits that grant of the Petition for Certiorari is appropriate and necessary to rectify a proceeding that crossed the line separating legal error from lawless behavior.

Respectfully submitted,

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Dated this 6th day of April, 1992.